

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**VIRNETX INC., and
LEIDOS, INC.,**

Plaintiffs,

V.

APPLE INC.,

Defendant.

§ § § § § § § § § § § §

No. 6:12-cv-00855-RWS

JURY TRIAL DEMANDED

**VIRNETX'S NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING
OPENING STATEMENTS**

Pursuant to the Court's request at the March 20, 2018 Pretrial Conference, VirnetX submits this Notice providing the Court with authority explaining that the ordering and timing of opening statements is a matter within the Court's discretion:

- *Son v. Muniz*, No. SACV 15-0020-PA(AJW), 2016 WL 3033689, at *11 (C.D. Cal. Mar. 21, 2016) (In a criminal case, explaining that “[t]here is no clearly established federal law providing that there is a constitutional right to give an opening statement.” (collecting cases, and citing *Herring v. New York*, 422 U.S. 853, 863 n.13 (1975)));
- *United States v. Conti*, 361 F.2d 153, 158 (2d Cir. 1966) (“The trial court required appellants to choose between making their opening statements immediately after the opening statements of the prosecution, and not making them at all. This seems well within the trial court’s broad power to regulate the conduct and timing of a trial, and not prejudicial to the defendants.”), *vacated on other grounds*, 390 U.S. 204 (1968);
- *United States v. Breedlove*, 576 F.2d 57, 60 (5th Cir. 1978) (finding a district court’s refusal to allow a defendant to reserve opening until its case-in-chief to be harmless error.);
- *Grey v. First Nat. Bank in Dallas*, 393 F.2d 371 (5th Cir. 1968) (time limit on opening statement “is a question so clearly committed to the discretion of the trial judge that we would intervene only where there is an egregious abuse of that discretion.”);
- *E. Prop. Dev. LLC v. Gill*, 558 Fed. Appx. 882, 888 (11th Cir. 2014) (“[T]he right to open and conclude argument is a procedural matter governed by federal law, *see Lancaster v. Collins*, 115 U.S. 222, 225, 6 S.Ct. 33, 34–35, 29 L.Ed. 373 (1885), which rests within the district court’s discretion.”);
- *Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc.*, 2016 WL 7547687, at *1 (W.D. Mich. Apr. 22, 2016) (“District courts have broad discretion to set and to establish the order of proofs at trial” (citing *United States v. Dittrich*, 100 F.3d 84, 86 (8th Cir. 1996)).

DATED: March 21, 2018

Respectfully submitted,

CALDWELL CASSADY & CURRY

/s/ Bradley W. Caldwell

Bradley W. Caldwell

Texas State Bar No. 24040630

Email: bcaldwell@caldwellcc.com

Jason D. Cassady

Texas State Bar No. 24045625

Email: jcassady@caldwellcc.com

John Austin Curry

Texas State Bar No. 24059636

Email: acurry@caldwellcc.com

Daniel R. Pearson

Texas State Bar No. 24070398

Email: dpearson@caldwellcc.com

Hamad M. Hamad

Texas State Bar No. 24061268

Email: hhamad@caldwellcc.com

Justin T. Nemunaitis

Texas State Bar No. 24065815

Email: jnemunaitis@caldwellcc.com

Christopher S. Stewart

Texas State Bar No. 24079399

Email: cstewart@caldwellcc.com

John F. Summers

Texas State Bar No. 24079417

Email: jsummers@caldwellcc.com

Warren J. McCarty, III

Illinois State Bar No. 6313452

Email: wmccarty@caldwellcc.com

CALDWELL CASSADY CURRY P.C.

2101 Cedar Springs Road, Suite 1000

Dallas, Texas 75201

Telephone: (214) 888-4848

Facsimile: (214) 888-4849

Robert M. Parker

Texas State Bar No. 15498000

Email: rmparker@pbatyler.com

R. Christopher Bunt

Texas State Bar No. 00787165

Email: rcbunt@pbatyler.com

PARKER, BUNT & AINSWORTH, P.C.

100 East Ferguson, Suite 1114

Tyler, Texas 75702
Telephone: (903) 531-3535
Telecopier: (903) 533-9687

T. John Ward, Jr.
Texas State Bar No. 00794818
Email: jw@wsfirm.com
Claire Abernathy Henry
Texas State Bar No. 24053063
Email: claire@wsfirm.com
WARD, SMITH & HILL, PLLC
1507 Bill Owens Parkway
Longview, Texas 75604
Telephone: (903) 757-6400
Facsimile: (903) 757-2323

**ATTORNEYS FOR PLAINTIFF
VIRNETX INC.**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on this 21st day March, 2018. Local Rule CV-5(a)(3)(A).

/s/ Bradley W. Caldwell
Bradley W. Caldwell